No. 96-1569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL BOGAN AND MARILYN RODERICK,
Petitioners,
v.
JANET SCOTT-HARRIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether individual members of a local legislative body are entitled to absolute immunity from liability under 42 U.S.C. § 1983 for actions taken in a legislative capacity.

2. Whether local legislators act in a legislative capacity when they propose or vote on municipal legislation.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United States. They have a compelling interest in the issue presented here: whether, and in what circumstances, local legislators are entitled to absolute immunity for acts taken in their legislative capacity in suits under 42 U.S.C. § 1983.

Amici and their members will be directly affected by the Court's resolution of the issue presented in this case; exposure to liability for legislative decision-making inevitably would have a significant impact both on individual legislative officers and on the municipalities they serve. At the same time, *amici* have unique experience with the practicalities of the local legislative process. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. Respondent Janet Scott-Harris, an African-American woman, was employed as the administrator of the Department of Health and Human Services ("DHHS") of the City of Fall River, Massachusetts. During the course of her tenure as DHHS administrator, respondent performed well but experienced continuing conflict with another city employee, Dorothy Biltcliffe. Respondent filed a complaint against Biltcliffe in October 1990 complaining about the latter's racially offensive remarks. Pet. App. 39-40. Biltcliffe responded by pressing her case with several city and state officials, including petitioner Marilyn Roderick, a city councillor and the chair of the City Council's ordinance committee. Before the hearing on respondent's charges, the parties accepted a settlement in which Biltcliffe was suspended without pay for sixty days. The punishment subsequently was reduced by petitioner Daniel Bogan, the City's mayor. *Id.* at 40.

In January 1991, in preparation for the 1992 Fiscal Year Budget, Mayor Bogan proposed a series

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.2 of the Rules of this Court.

of cuts in the City's budget as a response to an anticipated decline in aid from the State. Pet. App. 40. Mayor Bogan proposed eliminating DHHS (and with it, respondent's job); his budget also unfunded or eliminated 134 other city positions, resulting in the actual termination of twenty-seven city employees. *Id.* at 8. In addition, the budget froze the salaries of all city employees. The city council ordinance committee chaired by Ms. Roderick subsequently reported out an ordinance eliminating DHHS. Shortly thereafter, the City Council approved the ordinance by a vote of 6-2, Ms. Roderick voting with the majority. *Id.* at 41. Mayor Bogan signed the ordinance into law. *Ibid.*

2. Invoking 42 U.S.C. § 1983, respondent then brought this action in the United States District Court for the District of Massachusetts against the City, Mayor Bogan, Ms. Roderick, and other city councillors.[2] Respondent alleged that, in enacting the ordinance that eliminated her position, the defendants had (1) discriminated against her on the basis of race; and (2) retaliated against her for filing the complaint against Ms. Biltcliffe in violation of the First Amendment. The district court denied the individual defendants' motions to dismiss on the grounds of absolute legislative immunity, reserving the issue until after trial. J.A. 71-74. After a nine-day trial, the jury found that there had been no racial discrimination, but that respondent's protected speech was a substantial motivating factor in the City Council's decision to enact the ordinance. The City was held

[2] The claims against the other city councillors were dismissed by joint stipulation. J.A. 66-70. The remaining defendant, the city administrator, was granted a directed verdict at trial. *Id.* at 133-136.

liable, and Mayor Bogan and Ms. Roderick were found personally liable on the ground that they had acted maliciously or with reckless indifference to respondent's rights. The district court then rejected the individual defendants' assertion of absolute legislative immunity, holding that immunity was unavailable because "the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which incidentally resulted in the termination of plaintiff." Pet. App. 20.

The court of appeals affirmed the judgment against the individual defendants, but set aside the verdict against the City. Pet. App. 34-74. So far as the individual defendants were concerned, the court noted that "lawmakers have absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities." *Id.* at 63. The court went on to hold, however, that "legislators are not immune with respect to all actions that they take. The dividing line is drawn along a functional axis that distinguishes between legislative and administrative acts." *Id.* at 64. The court offered two related tests for separating these acts from one another:

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the impact of the state of action." If the action involves establishment of a general policy, it is legislative; if

> the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

Id. at 64-65, quoting *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

Applying this test, the court went on to conclude that "[w]hen the material facts are genuinely disputed, * * * the question is properly treated as a question of fact, and its disposition must await the trial." Pet. App. 65. And the court found that "here, conflicted evidence as to the defendants' true motives raised genuine issues of material fact." Focusing on the jury's conclusion that respondent's "constitutionally sheltered speech was a substantial or motivating factor in the actions which Roderick and Bogan took vis-a-vis the ordinance," the court reasoned that "[t]hese findings reflect the jury's belief that the individual defendants relied on facts relating to a particular individual—Scott-Harris—in the decision-making calculus." *Id.* at 66. In the court's view, enactment of the ordinance therefore "constituted an administrative rather than a legislative act." *Ibid.* *See id.* at 70 (immunity unavailable because evidence supported finding "that the desire to punish the plaintiff for her protected speech was a substantial or motivating factor" in Roderick's and Bogan's actions).

On the other hand, the court found that the City could not be held liable. The court explained that respondent offered evidence of improper motive as to no more than two of the six City Council members who supported the ordinance. *See* Pet. App. 60-61. The court also noted that "[n]othing suggests that the City Council deviated from its standard protocol when it received and enacted the ordinance that

abolished the plaintiff's job." *Id.* at 62. In these circumstances, the court held that it could not "rest municipal liability on so frail a foundation." *Id.* at 63.

SUMMARY OF ARGUMENT

A. This Court has recognized that government officials are entitled to immunity in actions brought under Section 1983 if there is a common law counterpart to the privilege asserted and the immunity sought is consistent with the statutory purposes. Under that test, municipal legislators plainly may claim absolute immunity for actions taken in their legislative capacity. At the time of Section 1983's enactment in 1871, it was a settled principle of common law that local legislators were entitled to absolute immunity for all discretionary actions that had a legislative character. In these circumstances, immunity is presumptively available under the statute: it is hardly likely "that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of Section 1983]." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Nor is there anything in the history or purposes of Section 1983 to counsel against recognition of absolute immunity for local legislators. To the contrary, the considerations that impelled the Court to accord such immunity to state and regional legislators apply with full force here. The Court has noted that, absent immunity from civil liability, state and regional (and, for that matter, federal) legislators would be cowed in the performance of their duties; that legislators would be distracted by having to engage in time-consuming and burdensome litigation; and that these considerations ultimately would discourage citizens

from undertaking government service. Precisely the same thing is true of municipal legislators. In these circumstances, there is a manifest "need for immunity to protect the 'public good.'" *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-405 (1979).

B. The First Circuit's test for determining the availability of legislative immunity—which provides that legislators may not assert immunity when the motivations for or effects of an ordinance supported by the legislators are insufficiently broad—is insupportable. Local legislators act in their legislative capacity, and therefore are entitled to absolute immunity under Section 1983, *whenever* they propose or vote on municipal legislation. That conclusion follows from *Tenney*, which held that absolute immunity comes into play so long as the challenged action was "an established part of representative government." 341 U.S. at 377. And it is confirmed by the Court's decisions under the Constitution's Speech and Debate Clause, which have uniformly held that voting and other acts performed in the course of enacting legislation are "within the 'sphere of legitimate legislative activity.'" *Gravel v. United States*, 408 U.S. 606, 624 (1972), quoting *Tenney*, 341 U.S. at 376.

The court of appeals' attempt to look behind the form of the legislation also is manifestly inconsistent with the purposes of legislative immunity. The various policies that underlie the immunity doctrine have clear application to all legislation, whether or not the enactment applies to a narrow subject or to a limited number of people. Indeed, the First Circuit's approach would render the protections of the immunity doctrine largely nugatory. The court held that a trial is necessary whenever there is conflicting evidence

about "the defendants' true motives." Pet. App. 65. But that requirement confuses the immunity inquiry with determination of the merits of the plaintiff's claim; it entirely defeats the purpose of immunity, which is "of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader." *Tenney*, 341 U.S. at 377.

ARGUMENT

LOCAL LEGISLATORS ARE ENTITLED TO ABSOLUTE IMMUNITY FOR ENACTING A MUNICIPAL ORDINANCE

The court of appeals properly recognized that municipal legislators are entitled to absolute immunity for actions undertaken in their legislative capacity. Such an immunity is firmly grounded in the common law, is essential to the sound working of municipal government, and is compelled by the logic of this Court's decisions allowing the assertion of immunity in closely related settings. But the court below—perhaps influenced by the rather idiosyncratic view that "great cities [are] 'pestilential to the morals, the health, [and] the liberties of man' " (Pet. App. 37 (citation omitted))—surely hopped the track in its further conclusion that immunity must be denied when there is a disputed issue of fact about whether the legislator-defendants' acts were prompted by an improper motivation. That approach, which finds no basis either in history or in this Court's decisions, would render legislative immunity largely illusory. It should be rejected.

A. Individual Legislators Are Entitled To Absolute Immunity From Liability Under 42 U.S.C. § 1983 For Actions Taken In A Legislative Capacity

This Court has not yet had occasion to resolve the question whether individuals performing legislative functions at the local level are entitled to absolute immunity from suit under 42 U.S.C. § 1983. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979). The test that the Court uses to resolve immunity questions, however, is familiar. The Court's

> initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. * * * If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in §1983 actions."

Malley v. Briggs, 475 U.S. 335, 339-340 (1986), quoting *Tower v. Glover*, 467 U.S. 914 (1984).[3] Applying this test in areas closely related to the one here, the Court has held that both state and regional legislators may claim such an immunity. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Lake Country Estates*, 440 U.S. at 403-406. *See also Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) (absolute judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute prosecutorial immunity). The

[3] *Accord, e.g., Richardson v. McKnight*, 117 S.Ct. 2100 (1997); *Wyatt v. Cole*, 504 U.S. 158 (1992); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

same conclusion should apply in this case: common law history and legislative policy both mandate absolute immunity for local legislators.

1. In determining questions of immunity under Section 1983, the Court has been guided by the "important assumption * * * that members of the 42nd Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). As a consequence, the first step in resolving an immunity claim is a "considered inquiry into the immunity historically accorded to the relevant official at common law." *Imbler*, 424 U.S. at 421. And here, the answer to that inquiry is plain: by 1871, it was a settled principle of common law that local legislators acting in their legislative capacities could claim absolute immunity.

The general view was stated in Cooley's influential treatise, which was written shortly after the enactment of Section 1983 and described authorities that predated the Civil Rights Act:

> *If we take the case of legislative officers, their rightful exemption from liability is very plain.* * * * The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. *This remark is not true, exclusively, of legislative bodies proper, but it applies also to inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like.*

T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 376 (1880) (emphasis added).[4]

Other nineteenth century authors likewise treated this principle as established law. "It is in the nature of a legislative power" that legislators cannot "be compelled to pay damages to one aggrieved either by their legislating or their declining to legislate. Therefore a person who has suffered from the non-existence of a municipal by-law, or from the enactment of an injurious one * * * can have no remedy against * * * [the] officers." J. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW AND ESPECIALLY AS TO COMMON AFFAIRS NOT OF CONTRACT OR THE EVERY-DAY RIGHTS AND TORTS § 744 (1889), citing *County Comm'rs of Anne Arundel v. Duckett*, 20 Md. 468 (1863); *Ex Parte the Mayor of Albany*, 23 Wend. 277 (N.Y. 1840). *See also* F. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS §§ 644, 646 (1890) ("[T]he rule is well settled that a public legislative officer is not liable to individuals for his

[4] In support of this statement of law, Cooley cited to several cases decided prior to the enactment of Section 1983, including *Freeport v. Marks*, 59 Penn. St. 253 (1868); *Buell v. Ball*, 20 Iowa 282 (1866); *Morris v. People*, 3 Denio 381 (N.Y. 1846); and *Wilson v. New York*, 1 Denio 595 (N.Y. 1845). Referring to *Wells v. Atlanta*, 43 Geo. 67 (1871), Cooley stated that "even the allegation of fraud cannot be listened to for the purpose of establishing such a liability." COOLEY, *supra*, at 377 n.1.

legislative action. . . . This immunity is not confined to members of national and state legislatures, but extends to the protection of members of * * * city councils."), citing *County Comm'rs of Anne Arundel*, 20 Md. 468; *Freeport v. Marks*, 59 Penn. St. 253 (1868); 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 274 (3d ed. 1881) ("Courts will not, in general, inquire into the *motives of members* of the council in passing ordinances.") (emphasis in original).

Not surprisingly, the nineteenth century cases bear out the observations of the treatises. A typical decision is *Wilson v. New York*, 1 Denio 595 (N.Y. 1845), which held that individual New York City aldermen were immune from suit because they had been acting in a legislative rather than a ministerial capacity:

> The civil remedy for misconduct in office is more restricted and depends exclusively upon the nature of the duty which has been violated. Where [that duty is] ministerial * * * the delinquent officer is bound to make full redress * * * but * * * if his powers are discretionary * * * he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done. These principles are too familiar and well settled to require illustration or authority, and in my view of the present question they govern and control it.

Id. at 599-600. *Accord, e.g., Hill v. The Board of Aldermen of the City of Charlotte*, 72 N.C. 63, 65 (1875) (quoting *Wilson*, 1 Denio at 595); *County*

Comm'rs of Anne Arundel, 20 Md. at 477, 479 (if the acts of the county commissioners were within their "legislative discretion * * * [then] they had the liberty of exercising [that discretion] as their sense of duty to their constituents dictated, without coercion or liability"; with regard to legislative power "[t]here is not that precision and certainty of duty, that ought to make them responsible to individuals, to any extent and for any damage").

Similarly, in *Jones v. Loving*, 55 Miss. 109 (1877), several city council members were sued individually on the claim that the passage of a specific ordinance was both unlawful and malicious in character. The plaintiff argued that the court should inquire into the motives of the city council members and thus apply only a qualified immunity standard. The defendant city council members replied by arguing that "no reported case be found in which * * * the officers of a municipal corporation[] were sued for legislative acts, whether they were unconstitutional, oppressive, malicious or corrupt." *Id.* at 110. The court agreed, stating that "it is impossible to perceive upon what theory such a suit can be maintained. * * * [I]ndividual members of [the city council] cannot be made personally liable for a mistaken exercise of their powers; nor is it possible to inquire into the motives which prompted their action." *Id.* at 111 (citing *Freeport v. Marks*, 59 Penn. St. at 253). The court added that "[w]henever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use."

Ibid. (citing *County Commissioners of Anne Arundel*, 20 Md. at 469).[5]

The common law permitted a cause of action against municipal legislators in only one circumstance: when they neglected to perform duties that were "ministerial," rather than "discretionary," in character. As Cooley explained:

> When such [legislative] bodies neglect and refuse to proceed to the discharge of their duties, the courts * * * cannot * * * impose the payment of damages upon them. * * * It is only when some particular duty of a ministerial character is imposed upon a legislative body in the performance of which its members severally are required to act—*no liberty of action being allowed, and no discretion*—that there can be a private action for neglect. Such ministerial duties are sometimes imposed upon the members of subordinate boards, like supervisors and county commissioners, and when they are, if they are imposed for the benefit of individuals, the members may be personally responsible for failure in performance.

COOLEY, *supra*, at 377 (emphasis added). This doctrine had a very limited scope, coming into play only when the legislature refused to fulfill "a duty * * * imposed by statute" (*County Comm'rs of Anne Arundel*, 20 Md. at 478) and where that statutory duty was "absolute, certain and imperative." *Wilson*, 1 Denio at 599. In contrast, immunity was unchallenged when, as in this case, the legislator's action was "discretionary, to be exerted or withheld, according to [the legislator's] own view of what is necessary." *Ibid.*

Against this background, it is manifest that the tradition of immunity from liability for discretionary acts taken in a legislative capacity by local legislators was recognized by the common law at the time Section 1983 was enacted. In these circumstances, immunity is presumptively available under the statute: it is difficult to "believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of Section 1983]." *Tenney*, 341 U.S. at 376.

2. The second element of the Court's inquiry asks whether, notwithstanding this settled common law immunity, "§ 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower*, 467 U.S. at 920. There is no such reason for hesitation here. Nothing in the

[5] Other decisions from the decades after enactment of Section 1983 treat the principle of absolute legislative immunity as long-established and generally recognized. *See, e.g., Villavaso v. Barthet*, 1 So. 599, 607 (La. 1887) ("From numerous respectable judicial authorities * * * [comes] the following principle: 'When the officers of a municipal corporation are invested with legislative powers, they are exempt from individual liability for the passage of an ordinance within that authority, and their motives in reference thereto will not be inquired into.'"); *McHenry v. Sneer*, 56 Iowa 649 (1881) (suit against individual council members for enacting or failing to enact ordinance not permitted); *Lough v. City of Esterville*, 122 Iowa 479, 485 (1904) ("It has always been the law that a public officer who acts either in a judicial or legislative capacity cannot be held to respond in damages on account of any act done by him in his official capacity. * * * [H]e cannot be mulcted in damages. This conclusion has the support of all the adjudged cases.").

legislative history of the statute suggests that, in enacting § 1 of the Civil Rights Act of 1871, the 42nd Congress intended to override municipal legislators' common law immunity.[8] In fact, the only history on point is to the contrary: Senator Thurman commented that if a legislator were "sued because he voted for a law * * * such a liability would be utterly destructive of the freedom of thought and action that are indispensable to the proper discharge of legislative duties." Cong. Globe, 42nd Cong., 1st Sess., app. 217 (1871). And because Congress surely "would have specifically so provided had it wished to abolish" an important common law immunity existing in 1871 (*Pierson v. Ray*, 386 U.S. 547, 555 (1967)), the silence of the legislative record suggests that absolute immunity for local legislators is consistent with the purposes of § 1983.

Equally as important, the considerations that impelled the Court to recognize absolute immunity for state and regional legislators—considerations grounded both in "the presuppositions of our political history" (*Tenney*, 341 U.S. at 372) and in a recognition of "the need for immunity to protect the 'public good'" (*Lake Country Estates*, 440 U.S. at 404-

[8] *See generally* Cong. Globe, 42nd Cong., 1st Sess., 749, 804 (1871) (conference reports) (hereinafter Globe); Globe 334 (Rep. Hoar); Globe 365-366 (Rep. Arthur); Globe 385 (Rep. Lewis); Globe 477 (Rep. Dawes); Globe 568-569 (Sen. Edmunds); Globe 805 (exchange between Rep. Willard and Rep. Shellabarger); Globe app. 67-68 (Rep. Shellabarger (introduction of bill)); Globe app. 80 (Rep. Perry); Globe app. 84-85 (Rep. Bingham); Globe app. 86 (Rep. Storm); Globe app. 91-92 (Rep. Duke); Globe app. 153 (Rep. Garfield); Globe app. 217 (Sen. Thurman); Globe app. 241 (Sen. Bayard).

405)—apply with full force here. The Court has explained that absolute immunity is designed to "insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980) (citation omitted). Such immunity also assures that legislators are not diverted from their public duties; "[a] private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Id.* at 733, quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). When recognizing absolute legislative immunity for regional legislators in *Lake Country Estates*, the Court accordingly noted that:

> "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. One must not expect uncommon courage even in legislators. * * * The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

440 U.S. at 405, quoting *Tenney*, 341 U.S. at 377.

Precisely the same considerations apply to municipal legislators. Indeed, Justice Marshall, dissenting in *Lake Country Estates*, recognized that there is

> little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of

> a trial" will impede officials in the "uninhibited discharge of their legislative duty" * * * applies with equal force whether the officials occupy local or regional positions.

Id. at 408 (citation omitted). And the courts of appeals, without exception, have agreed that "[t]here is no material distinction between the need to insulate legislators at the national level to protect the public good, * * * and the same need at the local level." *Rateree v. Rockett*, 852 F.2d 946, 949 (7th Cir. 1988) (citation omitted).[7]

Indeed, immunity here follows necessarily from *Lake Country Estates*. Without looking to the specific history of common law immunities for regional legislators, the Court held that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S. at 406. The Court went on to state that:

> [t]his holding is supported by the analysis in *Butz v. Economou*, 438 U.S. 478 [(1978)], which recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture. In that case, we rejected the argument that absolute immunity should be denied because the individuals were employed in the Executive Branch, reasoning that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." * * * This reasoning applies to legislators.

Id. at 405 n. 30, quoting *Butz*, 438 U.S. at 511.

It hardly need be added that this reasoning applies equally to local and regional legislators. In fact, if there is a distinction between the two, the case for immunizing *municipal* legislators is the stronger one. "[B]ecause municipal legislators are closer to their constituents they are more vulnerable to litigation and its inhibiting effect." *Aitchison v. Raffiani*, 708 F.2d 96, 98 (3d Cir. 1983). Additionally, "the threat of liability might be an even greater deterrent to service at the local level, where the rewards of pay and prestige generally are less than at the federal or state level." *Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989). And elected local officials, unlike appointed regional ones, are "directly accountable to the public for [their] legislative acts." *Lake Country Estates*, 440 U.S. at 407 (Marshall, J., dissenting). This reduces the need for a judicial remedy: "[w]hen municipal officials are elected, rather than appointed as in *Lake Country*, the argument for immunity becomes stronger. The electoral process itself acts as a powerful restraint on improper legislative action." *Aitchison*, 708 F.2d at 98 (citing *Gorman Towers*, 626 F.2d at 612). Finally, the case for

> absolute immunity for [local legislators] becomes stronger still when viewed in light of *Owen v. City of Independence*, * * * which reinterpreted section 1983 to make a municipality

[7] *See also Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989) ("[T]he rationale which undergirds state legislative immunity applies with equal force at the local level."); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 612 (8th Cir. 1980) (the court could "perceive no material distinction between the need for insulated decision making at the state or regional level and a corresponding need at the municipal level").

> liable in damages for all of its unconstitutional conduct. The absence of any immunity for city government not only provides an additional check on unlawful behavior by municipal legislators, but also provides an effective remedy for wronged individuals.

Id. at 613 (citation omitted).

3. It may be added that there is nothing novel in this conclusion. In *Owen v. City of Independence*, the four Members of the Court to reach the issue recognized that local legislators were entitled to absolute immunity for actions taken in their legislative capacity. There, the principal issue was the scope of the *municipality's* immunity because Paul Roberts, a city council member, was sued only in his official capacity. But Justice Powell, in a dissent for four Justices, expressly noted that "Roberts himself enjoyed absolute immunity from § 1983 suits for acts taken in his legislative capacity." 445 U.S. at 664 n. 6 (Powell, J., joined by Burger, C.J., Stewart and Rehnquist, JJ., dissenting) (citing *Lake Country Estates*, 440 U.S. at 402-406). In addition, all twelve of the courts of appeals that have addressed this issue have held that local legislative officials acting in their legislative capacity may claim absolute immunity.[8] There is no reason for the Court to disturb this settled law.

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[8] *See, e.g., Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992); *Goldberg v. Rocky Hill*, 973 F.2d 70 (2d Cir. 1992); *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983); *Bruce v. Riddle*, 631 F.2d 273 (4th Cir. 1980); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Kuznich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Fry v. Board of County Comm'rs*, 7 F.3d 936 (10th Cir. 1993); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989).

B. Legislators Act In Their Legislative Capacity When They Propose Or Vote On Municipal Legislation

Concluding that municipal legislators are entitled to absolute immunity for actions taken in their legislative capacity does not end the matter; it remains to determine whether petitioners' particular actions in this case *were* undertaken in a legislative capacity. That inquiry seems a simple enough matter: proposing and voting for municipal legislation—the conduct that is the focus of respondent's claim—would appear to be the quintessential legislative acts. But the First Circuit avoided that conclusion by holding that some legislation actually is not "legislative" at all and, instead, may be characterized as an "administrative act[]" that does not support an assertion of legislative immunity. Pet. App. 64. From that Orwellian starting point, the court of appeals offered its two related tests for distinguishing "between legislative and administrative acts":

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on "the particularity of the impact

> of the state of action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals and affect[s] them differently from others," it is administrative.

Id. at 64-65, quoting *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

This approach, which makes the availability of legislative immunity turn on the nature of the underlying legislation supported by the legislator-defendant, is insupportable. It is irreconcilable with this Court's decisions, it finds no support in history, and it would render legislative immunity largely nugatory.

1. In *Tenney*, the Court indicated that legislative immunity is available under Section 1983 when the defendant acted within "the sphere of legitimate legislative activity." 341 U.S. at 376. The scope of that sphere is defined by the purpose of the immunity: to assure "[f]reedom of speech and action in the legislature." *Id.* at 372. As a consequence, the Court held that immunity is available when the challenged action (in *Tenney*, a legislative inquiry) was "an established part of representative government." *Id.* at 377. The Court added that "courts should not go beyond the narrow confines of determining that [the challenged action] may fairly have been deemed within [the legislature's] province. To find that [the challenged legislators' action] has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Id.* at 378. That principle is dispositive here, for there can be no doubt that voting on legislation—even legislation that is

narrow in scope—is "an established part of representative government."

That conclusion is confirmed by the Court's decisions under the Constitution's Speech and Debate Clause—precedent that is directly applicable here because the Court has noted that the common-law immunity of state (and by extension, local) legislators "is similar in origin and rationale to that accorded Congressmen under the Speech and Debate Clause." The Court accordingly has "equated the legislative immunity to which state legislators are entitled under Section 1983 to that accorded to Congressmen under the [Clause]." *Supreme Court of Virginia*, 446 U.S. at 732, 733 (citations omitted). *See Lake Country Estates*, 440 U.S. at 405 (noting that the rationale for immunity "is reasoning [that] is equally applicable to federal, state, and regional legislators"); *United States v. Johnson*, 383 U.S. 169, 180 (1966) (*Tenney* "viewed the state legislative privilege as being on a parity with the similar federal privilege"). Indeed, citing *Tenney*, the Court has indicated that Speech and Debate immunity is available when challenged conduct "is within the 'sphere of legitimate legislative activity'" (*Gravel v. United States*, 408 U.S. 606, 623 (1972), quoting *Tenney*, 341 U.S. at 376), the formula that governs legislative immunity under Section 1983.

With this as background, the Court has made clear that "[i]n determining whether particular activities * * * fall within the 'legitimate legislative sphere' we look to see whether the activities took place 'in a session of the House by one of its members in relation

to the business before it.' " *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975), quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).[9] As a consequence, "[i]t is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts" (*United States v. Brewster*, 408 U.S. 501, 525 (1972)), granting immunity for "acts generally done in the course of the process of enacting legislation" (*id.* at 513) and for those that are "essential to legislating." *Eastland*, 421 U.S. at 508. In particular, "voting by Members * * * may not be made the basis of a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.' " *Gravel*, 408 U.S. at 624, quoting *Tenney*, 341 U.S. at 376. *See, e.g., Doe v. McMillan*, 412 U.S. 306, 311-312 (1973); *Kilbourn*, 103 U.S. at 204. *See also Tenney*, 341 U.S. at 374 (speech and debate immunity in Massachusetts constitution recognized to reach " 'the giving of a vote' "). This authority looks to whether the challenged action was part of the legislative process. It plainly does not countenance the First Circuit's inquiry into whether the legislation was premised on "generalizations" rather than "specific facts," or whether it had excessive "particularity."[10]

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[9] *Accord Doe v. McMillan*, 412 U.S. 306, 312 (1973); *Gravel*, 408 U.S. at 624; *United States v. Brewster*, 408 U.S. 501, 509 (1972); *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

[10] A majority of the courts to address the issue have agreed that the enactment of ordinances that are budgetary, that eliminate governmental positions, or that restructure local government departments is a legislative activity as a matter of law. *See, e.g., Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (council member had absolute immunity because the passage of a budget ordinance was a legislative act); *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996) (elimination of government position is legislative, but a unilateral order to fire an employee is not); *Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995) (budget decisions that necessarily impact on employment are generally legislative acts); *Gross*, 876 F.2d at 172 n.10 (personnel actions flowing from traditional legislative function like budget decisions are the type of actions for which legislators enjoy absolute immunity); *Finch v. City of Vernon*, 877 F.2d 1497 (11th Cir. 1989) (city council's vote to abolish positions in the police force is a legislative function); *Rateree*, 852 F.2d at 950 (budget making is a quintessential legislative function and job loss as a result of budget process does not make the act administrative); *Aitchison*, 708 F.2d at 98 (mayor entitled to legislative immunity for act of voting to pass ordinance eliminating plaintiff's position, regardless of claim of any unworthy purpose); *Rabkin v. Dean*, 856 F. Supp. 543, 547 (N.D. Cal. 1994) (legislative votes affecting positions and salaries of city employees are consistently interpreted as legislative acts); *Racine v. Cecil County*, 843 F. Supp. 53, 54-55 (D. Md. 1994) (absolute immunity where position eliminated); *Drayton v. Mayor & Council of Rockville*, 699 F. Supp. 1155, 1156 (D. Md. 1988) (job elimination through budgetary process is a legislative act entitled to absolute immunity regardless of alleged discriminatory motives), *aff'd*, 885 F.2d 864 (4th Cir. 1989); *Herbst v. Daukas*, 701 F. Supp. 964, 968 (D. Conn. 1988) (abolition of municipal positions constitutes a legislative act); *Ditch v. Board of County Comm'rs*, 650 F. Supp. 1245, 1248-49 (D. Kan. 1986) (elimination of a program or job title is a formulation of policy and therefore entitled to absolute immunity), *amended on other grounds*, 699 F. Supp. 1553 (D. Kan. 1987); *Dusanenko v. Maloney*, 560 F. Supp. 822, 827 (S.D.N.Y. 1983) (absolute immunity applied to decision by town officials to reduce salaries), *aff'd*, 726 F.2d 82 (2d Cir. 1984); *Goldberg v. Village of Spring Valley*, 538

The court of appeals' distinction also finds no support in the history of common law immunity predating enactment of Section 1983. As we have noted (at 14-15, *supra*), courts in the nineteenth century distin-

guished between ministerial and discretionary acts. But *amici* are aware of no decision in any jurisdiction holding that a legislator's discretionary action—an action related to enacted legislation—lost its immunity because it affected an insufficiently large number of people.

2. The court of appeals' attempt to look behind the form of the legislation also is manifestly inconsistent with the purposes of legislative immunity. Legislators are given protection from suit so that fear of liability does not prevent "uninhibited discharge of their legislative duty," while also assuring that they are not distracted in the performance of their official functions. *Tenney*, 341 U.S. at 377; *see Lake Country Estates*, 440 U.S. at 405. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity combats the " 'distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service' ") (citation omitted); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (same). These important public goals apply with full force to legislation that affects only a narrow subject or limited number of people. Certainly, this Court never has suggested that federal or state legislators lose their immunity when the legislation at issue had a limited scope.[11] And municipal

F. Supp. 646, 650 (S.D.N.Y. 1982) (individual trustees who approved mayor's action which resulted in elimination of plaintiff's position were entitled to absolute immunity).

[11] If that were the rule, the Speech and Debate Clause would lose much of its force. *See, e.g.*, Hitt, *Special Tax Breaks Appear, and May Face Veto*, WALL ST. J., Aug. 1, 1997, at A2 (legislation contains 79 separate tax provisions that benefit 100 or fewer people). As for state legislators, *Tenney* itself involved a challenge to a legislative inquiry that was targeted at a *single* individual. *See* 341 U.S. at 370-371.

legislation by definition often will deal with highly localized problems.

In fact, the court of appeals' standard would have the effect of rendering the protections of the immunity doctrine largely nugatory. In adopting its test, the First Circuit sought to address the concern that the "neutral appearance" of an ordinance might be a "ruse" (*Acevedo-Cordero* v. *Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992)); the court therefore held that a trial is necessary when "conflicted evidence as to the defendants' true motives raise[s] genuine issues of material fact." Pet. App. 65. But this approach entirely defeats the purpose of immunity, which is "of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader." *Tenney*, 341 U.S. at 377. After all, "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action," which includes "an entitlement not to stand trial or face other burdens of litigation." *Mitchell*, 472 U.S. at 525, 526. That is why, "[t]o preserve legislative independence, [the Court] ha[s] concluded that "legislators engaged "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U.S. at 376, should be protected not only from the consequences of legislation's results, but also from the burden of defending themselves.' " *Supreme Court of Virginia*, 446 U.S. at 731-732 (citation omitted). *See id.* at 733. Yet by allowing inquiry into whether legislators' actions were prompted by "a constitutionally proscribed reason" (Pet. App. 65), the court of appeals subjected municipal legislators to that burden whenever facts are disputed—and made the resolution of the immunity defense indistinguishable from determination of the *merits* of the plaintiff's claim.

The court of appeals' approach is particularly problematic because the plaintiff's allegation here, as well as application of the court's test, turn largely on the defendant-legislators' motives. Allegations of improper motive like the ones at issue in this case are easy to make, difficult to disprove, and almost always involve disputed issues of fact; as the Court noted in *Tenney*, "dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." 341 U.S. at 378 (footnote omitted). Indeed, the Court held inquiry into subjective motivation improper in the *qualified* immunity setting precisely because "there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 816-817 (footnotes omitted). The First Circuit turned that insight on its head by making just such an inquiry a prerequisite for the assertion of *absolute* immunity.

The problems caused by the court of appeals' approach are graphically illustrated here. The court concluded that the City could not be held liable because there was absolutely no evidence that a majority of the city council members who supported the challenged ordinance acted on the basis of an improper motive. Pet. App. 59-63. *See id.* at 59-60 ("Scott-Harris has not only failed to prove that a majority of the councilors possessed a bad motive, but she also has failed to furnish enough circumstantial evidence to ground a finding that, more likely than not, a discriminatory animus propelled the City Council's action."). This means that, even when the constitu-

tionality of a municipal ordinance itself is unassailable, a plaintiff may sue an individual legislator, arguing that he or she supported the ordinance for an improper reason. And such an allegation, as we have explained, almost invariably will involve a disputed issue of fact. This system positively encourages the sort of harassing and vexatious litigation that legislative immunity is designed to prevent.

3. Against this background the appropriate outcome here is plain. Scott-Harris' allegations are directed at legislative acts relating directly to "the introduction and passage of [an] ordinance." Pet. App. 43. If the ordinance was enacted to punish respondent's exercise of her First Amendment rights, she was entitled to have the legislation invalidated and to obtain damages from the City—an approach that she unsuccessfully tried. *Cf. Tenney*, 341 U.S. at 379 (Black, J., concurring) ("the validity of legislative action" is not "coextensive with the personal immunity of the legislature"). But "the individual defendants * * * were acting in a field where legislators traditionally have the power to act" (*ibid.* (majority opinion)) and were engaged in an activity—the enactment of legislation—that lies at the heart of the legislative function. As the Court held in *Tenney*, "the statute of 1871 does not create civil liability for such conduct." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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